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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

FRANK FITZGERALD, Trustee for MT. FOREST FUR FARMS OF AMERICA, INC.,
Petitioner,

v.

GULF REFINING COMPANY OF LOUISIANA,
GULF REFINING COMPANY,
HUMBLE OIL AND REFINING COMPANY,
SHELL OIL COMPANY, INC.,
FREEPORT SULPHUR COMPANY, and
ERNEST COCKRELL,
Respondents.

Nos. 763-769

BRIEF ON BEHALF OF RESPONDENTS FREEPORT SULPHUR COMPANY, GULF REFINING COMPANY OF LOUISIANA, GULF REFINING COMPANY, HUMBLE OIL AND REFINING COMPANY, AND SHELL OIL COMPANY, INC., IN OPPOSITION TO PETITION FOR WRITS OF CERTIORARI.

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May It Please the Court:

STATEMENT OF THE CASE

This case involves an extraordinary and unprecedented attempt to require the respondents whom we represent to litigate in a court of bankruptcy in **Michigan** the respondents' title to mineral property situated in the State of **Louisiana** near the Gulf of Mexico, of which **the respondents have been in undisturbed, exclusive, open and notorious possession for many years.** The process of the bankruptcy court was served upon all the respondents extra-territorially.

In a summary proceeding, instituted by a rule to show cause, the District Court in Michigan, Honorable Arthur F. Lederle, Judge, undertook to try the title to this property, and by its judgment to dispossess the respondent oil companies and sulphur company therefrom. In exercising their rights over the property in controversy, respondents employ hundreds of men and utilize facilities representing investments of millions of dollars, **all to the full knowledge of the Debtor, which before the institution of this proceeding had never made any attempt to restrain the operations of the respondent companies, but on the contrary had expressly and repeatedly recognized their right to pursue the same.** By its judgment the Michigan federal court nevertheless undertook to enjoin the respondent companies from carrying on their operations. This judgment was reversed by the United States Circuit Court of Appeals for the Sixth Circuit, whose decision this Court is now asked to review.

The plaintiff and the present petitioner is the Trustee in Bankruptcy appointed by the District Judge in a bankruptcy reorganization proceeding instituted under Chapter X of the Bankruptcy Act. The Debtor is a Delaware corporation, which filed notice of withdrawal from Michigan in 1931, had no property in Michigan except 80 acres of land valued at $300, and at the time of the filing of the reorganization proceeding had negligible debts (R. IV-2197; I-4; IV-2073).

The respondents are Ernest Cockrell, a resident of Houston, Texas, four oil companies and a sulphur company. None of the defendants is domiciled in Michigan. The two corporate respondents who are carrying on the actual mineral operations (Humble Oil & Refining Company and Freeport Sulphur Company) do no business in Michigan and are not subject to ordinary service of pro-

cess there. As previously noted, service on all the respondents was made extra-territorially.

Although the petitioner describes the proceeding as one "to enjoin further depletion of the debtor's property", it is actually one to **try the title** to property **claimed** by the Debtor. The District Court attempted by extra-territorial service of process to compel respondents to litigate, in a court removed by more than a thousand miles from the situs of the property in controversy, the issues of local Louisiana law affecting the title to the Louisiana mineral rights in controversy which were, and long had been, in the possession of respondents.

Upon the merits, the controversy involves (a) the rights which the respondent Cockrell retained by virtue of a mineral reservation contained in a deed which he made to the Debtor's predecessor, and (b) the rights which the other respondents acquired under a mineral lease granted by Cockrell in 1928 pursuant to such reservation.[1]

In the **ten years** which elapsed from the date of this lease to the date of the institution of the present proceeding, the Debtor **repeatedly recognized** the respondents' lease and their right to conduct these operations (which have been actively in progress since 1928) by written demands and by sworn pleadings which the Debtor filed in various actions in the State courts of Louisiana, in all of which the Debtor claimed only royalties accruing under the very lease which the Trustee now attacks (R. IV-1641, 1934, 1607-8, 1959).

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[1]Cockrell, acting pursuant to the reservation contained in his deed to the Debtor's predecessor, made a mineral lease to Gulf (R. IV-1572). Subsequently Gulf, Shell and Humble pooled their rights under various leases, including the Cockrell lease, and Humble was designated to conduct the operations under these leases. In 1932 these oil companies subleased the sulphur rights to Freeport, reserving substantial royalties (R. IV-1663, 1859, 1721, 1855).

Thus, in an action which the Debtor brought in 1931 against Cockrell to recover the bonus which Cockrell had received for executing the lease, the Debtor alleged:

> "That while petitioner avers that according to the clause in the Act of April 11th, 1927, * * * the said Cockrell **had the right,** for and on behalf and in the name of petitioner as the owner of 127/150ths interest in the said property, **to make a valid lease of its interest** in and to the said lands for the exploration, development, production and marketing of **the minerals** in, under, upon or beneath said lands, petitioner avers that the said Cockrell was not entitled to receive and/or retain either the consideration for the making of said leases, or the consideration for the granting of any extension, or extensions, of said leases, or the consideration for the granting of any indulgence to the lessee thereunder." (R. IV-1938).[2]

In that action the Supreme Court of Louisiana expressly found, **as long ago as 1934,** that Cockrell

> **"unquestionably retained for himself * * * the perpetual and exclusive right to make and execute mineral leases on *all* or any portion of the land."** *Mt. Forest Fur Farms of America, Inc. v. Cockrell,* 179 La. 795, 798 (1934).

The District Court disregarded this decision of the Supreme Court of Louisiana (which the respondents had specially pleaded and which the Circuit Court of Appeals found to be *res judicata,* 122 F. (2d) 232, 244), and adopted the Trustee's contention that Cockrell

> "had no right or power to make any lease * * * of more than 1/8th * * * of the minerals in, on or under the above described real estate"

[2]Black lettering in this brief is always that of the authors of the brief unless it is otherwise stated.

and, indeed, even found that the corporate respondents had taken the minerals **"without any color of right"**! (R. I-339-40).

At the very time the proceedings were instituted in the bankruptcy court in Michigan (in 1938), there was pending in the State courts of Louisiana, and had been pending there **since 1936,** a proceeding instituted by the Debtor corporation against all the respondents, in which the Debtor by express allegations again recognized (as it had theretofore repeatedly recognized) the mineral rights of the respondent oil companies and the respondent sulphur company under the Cockrell lease and claimed only that royalties accruing under that lease should be paid to the Debtor instead of to Cockrell, the lessor (R. IV-1959).

In the District Court respondents filed motions to dismiss for lack of jurisdiction (R. I-60, 123, 124). Thereafter, with reservation of their rights under the jurisdictional issue, respondents moved the Court to stay the proceedings and refer the issues of Louisiana law to the Louisiana State courts, in accordance with the opinion of this Court in *Thompson, Trustee v. Magnolia Petroleum Co.*, 309 U. S. 478 (1940) (R. II-391-402). These motions were overruled by the District Court (R. III-1501).

In the District Court respondents also filed motions directing the Court's attention to the fact that the Board of Commissioners for the Buras Levee District, a Louisiana municipal corporation, and The Moran Corporation of the South, a Delaware corporation, were indispensable parties because of interests which they claimed in the property in controversy (R. II-403-6). These motions were also overruled (R. III-1501).

The District Court proceeded to try the case upon the merits, and on July 10, 1940, handed down a judgment against all of the respondents, holding that the lease granted by Cockrell was invalid as to the seven-eighths interest claimed by the Trustee. The judgment declared that Freeport and Humble had taken assets of the Debtor "without any color of right" and enjoined them from further production of oil and sulphur unless they paid over to the plaintiff Trustee the proceeds of all oil and sulphur production in controversy "less the cost of production and a reasonable profit thereon" (R. I-336-43).

Notwithstanding that the case involves questions of Louisiana law as to which the parties were in sharp conflict, and that the value of the mineral property in controversy is very large, the District Court rendered no written opinion. Instead, it adopted as its own the elaborate findings of fact and conclusions of law which were submitted to it by counsel for the Trustee and which (except for two paragraphs and for purely formal changes in two others) it accepted *verbatim* as written, without changing a comma (R. I-274-335).

The District Court not only rejected, without opinion or reasons, the motions to stay the cause and refer the issues of Louisiana law to the Louisiana courts for decision, consonant with the ruling of this Court in *Thompson, Trustee v. Magnolia Petroleum Co.*, 309 U. S. 478 (1940), but it actually undertook to **prevent** the Louisiana Supreme Court from passing upon the issues of Louisiana law by **enjoining** the trial of the case between the Debtor corporation and the respondents which is pending in the State courts of Louisiana and has been pending there since 1936 (R. I-329; for terms of order see Record in case No. 770).

By unanimous opinion handed down on August 15,

1941 (122 F. (2d) 232), the Circuit Court of Appeals for the Sixth Circuit reversed the decision of the District Court and directed that the motions of the respondents to dismiss the summary proceedings for lack of jurisdiction be sustained and the suit of the Trustee dismissed. In striking contrast to the District Court, the Circuit Court of Appeals rendered a careful and painstaking opinion, which states the facts of the case insofar as necessary for the consideration of the jurisdictional points.

ARGUMENT

Nothing in Chapter X of the Bankruptcy Act Gives a Bankruptcy Court Jurisdiction to Try the Title to Property Actually in the Possession of a Third Person Who Holds Under a Substantial Adverse Claim and Who Is Not Subject to the Territorial Jurisdiction of the Court.

It is conceded that as a matter of general bankruptcy law, a bankruptcy court has no jurisdiction to entertain a proceeding to recover property in the adverse possession of another who makes a claim of a substantial character thereto, or to try the title to such property; *Harrison, Trustee v. Chamberlin*, 271 U. S. 191 (1926).

In the District Court (as also in the Court of Appeals and now in this Court), the Trustee undertook to avoid the application of this rule by attempting a showing that the Debtor was in possession. The opinion of the Circuit Court of Appeals sufficiently demonstrates the lack of basis for such a contention upon the record. Realizing the difficulties of the contention, the Trustee made, and now makes, an alternative contention that the well-settled bankruptcy rule has been changed by the provisions for reorganization of corporations contained in

Chapter X of the Bankruptcy Act;[3] that under these provisions possession is no longer the test of jurisdiction; and that as to such proceedings Congress intended to give, and did give, the bankruptcy court **unlimited** jurisdiction over all property to which the debtor **asserts** a claim, even though the property is in the actual possession of a third person who asserts ownership thereof upon a most substantial basis and who is not subject to the territorial jurisdiction of the court.

It would require plain language to lead the Court to the conclusion that Congress intended to permit such a result. In the present economic development of our country, operations in many states are carried on by large corporations with their principal places of business on the Atlantic seaboard. If the view contended for were to prevail, then in every controversy with such a corporation, adverse claimants in possession of property situated in Louisiana or California, for example, would be required to litigate in a remote bankruptcy court, at great expense, issues of local law which, except for the intervention of bankruptcy reorganization proceedings, would necessarily have to be tried in the courts of the States where the property is located or the adverse claimants reside. It is difficult to suppose that a national legislature composed of representatives from all sections of the country would have sanctioned such a result, by which, in effect, the residence of the plaintiff would be substituted for that of the defendant, or for the situs of the property, as the test of venue.

No such result is justified by the language of the sections of the law upon which the Trustee relies. These

[3]These provisions were originally enacted in 1934 as Sections 77A and 77B of the Bankruptcy Act (48 Stat. 912, 11 U.S.C. 206-7). In 1938 the Bankruptcy Act was amended and these sections were incorporated in Chapter X of the Bankruptcy Act, which now appears as 11 U.S.C. 501-676.

are Sections 102 and 111 of Chapter X which we now discuss in inverse order:

Nothing in Section 111 of Chapter X Supports Jurisdiction in This Case.

Section 111 of the Bankruptcy Act reads as follows:

> "Section 111—Where not inconsistent with the provisions of this chapter, the court in which a petition is filed shall, for the purposes of this chapter, have exclusive jurisdiction of the debtor and its property, wherever located." (11 U.S.C. 511).

It will be noted that the jurisdiction conferred by Section 111 over the property of the debtor wherever situated is conferred upon the bankruptcy court only **"for the purposes of this chapter"**, i.e., for the purposes of consummating a reorganization.[4]

This provision as to jurisdiction was inserted only to make it plain that the reorganization might include property outside the judicial district without the necessity of ancillary proceedings,[5] **where there was no controversy as to whether the debtor owned the property.** See Gerdes on Corporate Reorganizations (1935), pages 1351-1354.[6]

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[4]This provision was not new in Chapter X; it appeared in Section 77B; see 11 U.S.C. 207 (a).

[5]The qualifying phrase **"for the purposes of this chapter"** in Section 111 becomes the more significant when it is noted that Chapter X contains elaborate provisions as to proceedings for the adjustment of rights as between the debtor and its creditors and stockholders, and no such provision as to controversies over property or property rights between the debtor and an adverse claimant in possession.

[6]"The reorganization court therefore has practically complete and paramount jurisdiction in so far as the debtor and its property are concerned. But country-wide control over the debtor and its property does not necessarily carry with it jurisdiction over persons against whom the debtor or its trustee may assert a claim, even if such persons are in possession of property claimed to belong to the debtor or its trustee. In so far as jurisdiction over persons other than the debtor or parties to the proceedings are concerned, the jurisdiction of the court in a proceeding under Section 77B would seem to be confined to its territorial limits. * * *" See Gerdes, *op. cit.*, pages 1353-1354.

It was not intended to give the bankruptcy court jurisdiction to try the title to property not in the actual or constructive possession of the corporation to be reorganized, but in the adverse possession of another who claims that he, and not the corporation to be reorganized, owns it; see Gerdes, *op. cit.*, page 1480:

> "The provision of Section 77B granting the court exclusive jurisdiction over the debtor's property is inapplicable where the controversy revolves around the question whether the property is that of the debtor. **Until that question is determined, the court's exclusive jurisdiction does not attach.**"

That Section 111 did not give the bankruptcy court the unlimited jurisdiction for which the Trustee contends is clearly indicated by the decisions of this Court in *Continental Illinois National Bank & Trust Co. v. Chicago, Rock Island & Pacific Ry. Co.*, 294 U. S. 648 (1935), and *Thompson, Trustee v. Magnolia Petroleum Co.*, 309 U. S. 478 (1940), both of which cases were cited and discussed by the Circuit Court of Appeals in its opinion below (122 F. (2d) 232, 238, 239). These cases arose under Section 77 of the Bankruptcy Act relating to railroad reorganizations (11 U.S.C. 205), which contains language identical with the language now appearing in Section 111 of Chapter X to the effect that a reorganization court shall, during the pendency of the proceedings and for the purposes thereof, "have exclusive jurisdiction of the debtor and its property, wherever located."

In the *Rock Island* case (294 U. S. 648), the Court was careful to point out that it was doing "no more than suspend the enforcement" of a lien on property admittedly the debtor's and that it was **not trying title** to property adversely held:

"It is next contended that the court was without power to issue the injunction in a summary proceeding. **Obviously, an application for an injunction against the immediate enforcement of a remedy is not the assertion of an adverse claim.** The bonds deposited as collateral were not in the hands of purchasers, but in the hands of creditors as security. That the equity which the debtor retained was a property interest, was not and could not be disputed by the creditors; nor was the claim of the creditors in respect of their rights in the collateral security or the rank of their liens questioned by the debtor. **In short, no adverse claim was brought forward by either of the parties to the controversy.** The only question was in respect of the creditors' remedy; and the sole point is as to the authority of the bankruptcy court to delay for a reasonable time an interference with the reorganization proceeding which would result from an immediate sale of the collateral." (294 U. S. 648, 681).

In the *Magnolia* case (309 U. S. 478), unlike the *Rock Island* case, an issue of title was involved, there being an adverse claim of ownership. Yet in the *Magnolia* case the Court expressly declared that jurisdiction depended upon possession,[7] not title:

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[7]While the legal principle laid down in the *Magnolia* case, *supra*, is decisive on the point that possession is the test of jurisdiction, the facts in the *Magnolia* case differ sharply from the facts in this case.

In the *Magnolia* case, up to the time of the bankruptcy proceeding, no one was in possession of the mineral rights by the exercise thereof because no well had been drilled upon the property; the only possession of any sort was that of the surface, which was used by the debtor and the trustee for railroad purposes. In order to prevent drainage of oil from the property claimed by the trustee through oil wells already drilled on adjacent property, the trustee was authorized to drill on the property which he was occupying for railroad purposes, and it was ordered that the proceeds be impounded.

In our case, at the time of the institution of the reorganization proceedings, the mineral rights were, and had been for many years, in the undisturbed exclusive possession of the respondent oil companies and sulphur company, and many oil and sulphur wells had been drilled by them without any pretense being made that the Debtor would have any legal right to question these operations.

These differences were carefully noted by the Circuit Court of Appeals; see footnote, pages 238-239 of 122 F. (2d).

> "Bankruptcy courts have summary jurisdiction to adjudicate controversies relating to property over which they have actual or constructive possession. And **the test of this jurisdiction is not title in but possession** by the bankrupt at the time of the filing of the petition in bankruptcy." (309 U. S. 478, 481).

It thus appears that this Court in both the *Magnolia* and the *Rock Island* cases has already clearly indicated that language corresponding to the language of Section 111 of Chapter X does not change the test of jurisdiction in the bankruptcy court from possession to property interest as the petitioner contends.[8]

Nothing in Section 102 of Chapter X Supports Jurisdiction in this Case.

Section 102 of the Bankruptcy Act reads:

> "Section 102—The provisions of chapters I to VII, inclusive, of this Act shall, insofar as they are not inconsistent or in conflict with the provisions of this chapter, apply in proceedings under

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[8]The decision in the *Magnolia* case shows that possession remains the test of summary jurisdiction against adverse claimants even in a case where the statute contains an express provision for nationwide service of process (as it does not in the present case). In railroad reorganization cases express provision for nationwide service of process was made by the amendment of August 27, 1935 (11 U.S.C. 205 (a)). There is no corresponding provision in Chapter X and there was none in Section 77B. The *Magnolia* case shows that even in railroad reorganization cases an express provision for nationwide service does not enlarge summary jurisdiction but is applicable merely in a case where the court would otherwise have such jurisdiction, i.e., where the property is admittedly the debtor's property and not in the possession of one having a substantial adverse claim thereto.

This was recognized by the Court of Appeals when it said:

> "Neither exclusive jurisdiction of the debtor **nor power to issue process outside the district** confers upon the bankruptcy court the power, in a summary proceeding, to decide, without the consent of an adverse claimant, a controversy concerning property in his possession, unless his claim be merely colorable. Were it otherwise, every bona fide possessor of property held adversely to a bankrupt could be haled into a distant Federal Court to defend his right to the property whenever the trustee in a reorganization proceeding should choose to corral him summarily." (122 F. (2d) 232, 239).

this chapter: *Provided, however,* That section 23, subdivisions h and n of section 57, section 64, and subdivision f of section 70, shall not apply in such proceedings unless an order shall be entered directing that bankruptcy be proceeded with pursuant to the provisions of chapters I to VII, inclusive. * * * " (11 U.S.C. 502).[9]

Petitioner contends that jurisdiction in this case is supported by the provision in Section 102 that Section 23 of the Bankruptcy Act shall not apply to proceedings under Chapter X. This contention also will not survive examination.

The abrogation of Section 23 of the Bankruptcy Act contained in Section 102 did not enlarge the **summary** jurisdiction of the bankruptcy court. The only effect which it had upon the **plenary** jurisdiction of the bankruptcy court was to make it plain that suits might be maintained in that court **against defendants subject to suit in the district,** without requirement of diversity of citizenship and jurisdictional amount; **it did not enlarge the territorial jurisdiction of the bankruptcy court.**

The sole purpose of the provision in Chapter X that Section 23 should ordinarily not apply to proceedings thereunder, was to make it clear that a bankruptcy court sitting in a reorganization proceeding should have all the powers formerly exercised by an equity court in receivership proceedings so that jurisdictional requirements with respect to diversity of citizenship and amount involved would not be applicable. There was no intention to give a bankruptcy reorganization court more extensive powers than a court of equity would have, by permitting process

[9]In 11 U.S.C. 502 the references to section numbers in the Bankruptcy Act are changed to the section numbers as they appear in the U. S. Code. Thus Sections 23, 57, 64 and 70 of the Bankruptcy Act become Sections 46, 93, 104 and 110 respectively of the U. S. Code.

of the bankruptcy court to run throughout the nation, which is the result for which the petitioner here contends.

This is clear from a consideration of the legislative history of Section 102, our statement of which we condense as far as is consistent with reasonable clarity.

Section 77B of the Bankruptcy Act contained in paragraph (a) a provision that the bankruptcy court

> " * * * shall have and may exercise all the powers, not inconsistent with this section, which a Federal court would have had it appointed a receiver in equity of the property of the debtor by reason of its inability to pay its debts as they mature."[10]

It has long been well-settled that a federal equity court sitting in a receivership proceeding may entertain suits without regard to diversity of citizenship or amount in controversy; see *White v. Ewing*, 159 U. S. 36 (1895).[11] It was the intention of the framers of Section 77B of the Bankruptcy Act to give the bankruptcy reorganization court the same power (not anything more). However, after the enactment of Section 77B doubts were expressed as to whether this result had been accomplished in view of the fact that the Bankruptcy Act contained in Section 23 a provision that except in case of proceedings under Sections 60, 67 and 70, suits by a trustee should be brought only in the courts where the bankrupt might

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[10]11 U.S.C. 207 (a), 48 Stat. 912 (1934), as amended August 20 and 29, 1935. In the revision of 1938 this provision became Section 115 of Chapter X and now is 11 U.S.C. 515.

[11]No one ever suggested that this doctrine gave a federal equity court the power to extend its process extra-territorially throughout the nation. The contrary has been expressly held repeatedly. See *Barfield v. Zenith Tire & Rubber Co.*, 9 F. (2d) 204 (D.C.N.D. Ohio, 1924); *Bovay v. H. M. Byllesby & Co.*, 88 F. (2d) 990 (C.C.A. 5, 1937) at page 992; *United States v. Tacoma Oriental S.S. Co.*, 86 F. (2d) 363 (C.C.A. 9, 1936) at page 369; *In re Standard Gas & Electric Co., Hastings v. H. M. Byllesby & Co.*, 119 F. (2d) 658 (C.C.A. 3, 1941) at pages 664-665; compare *Thompson v. Terminal Shares, Inc.*, 104 F. (2d) 1 (C.C.A. 8, 1939), certiorari denied 306 U. S. 652.

have brought them unless by consent of the defendant.[12] It was for the purpose of removing this point from doubt and **for no other purpose** that in the 1938 revision of the bankruptcy law there was written into Section 102 of Chapter X a provision that ordinarily Section 23 should not apply to proceedings thereunder.

As reported by the House Judiciary Committee and adopted by the House, Section 102 contained no express exclusion of Section 23.[13] The express exclusion of Section 23 was proposed by the Senate Judiciary Committee at the suggestion of Professor John Gerdes. Professor Gerdes was of the view that Section 23 was already inapplicable under Section 77B, but, in view of the doubts which had been expressed on this point, thought that it should be put beyond controversy.[14]

The hearings before the subcommittee of the Committee on the Judiciary of the United States Senate (75th

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[12]Section 102 was derived from subdivision (k) of Section 77B; see Bankruptcy Act of 1938 As Amended, With Annotations by John Hanna and James Angell McLaughlin (1938), page 122; Weinstein, Bankruptcy Law of 1938, page 193.

Prior to the revision of 1938, subdivision (k) had provided that certain enumerated sections of the bankruptcy law should not apply to reorganization proceedings. The sections thus enumerated did not include Section 23. Although there was a general provision to the effect that provisions of the Bankruptcy Act inconsistent with the provisions of Section 77B should not be applicable to proceedings under Section 77B, there was a difference of opinion as to whether Section 23 would be excluded by this general reference, i.e., as to whether Section 23 would be considered inconsistent with provisions of Section 77B. It was to remove this doubt, as noted in the text, that in the 1938 revision Section 23 was expressly included in the enumeration in Section 102 of sections of the Bankruptcy Act which would not apply in reorganization proceedings.

[13]House Reports, 75th Congress, First Session, Report 1409, page 97.

The hearings referred to on page 29 of petitioner's brief have nothing whatsoever to do with Section 102 of the Chandler Act as finally adopted. The hearings referred to took place on June 4, 1937. At that time Section 102 of Chapter X, as then under consideration by the House Committee, did not specifically exclude Section. 23. The Act passed the House on August 10, 1937, but was substantially amended in the Senate where it was not passed until June 10, 1938, being finally approved on June 22, 1938, 52 Stat. 840, c. 575.

[14]See footnote 15, *infra*, page 16.

Congress, Second Session, H. R. 8046, page 77) contain the following illuminating statement:

> "Mr. Gerdes. Chapter X is not intended to be self-sufficient. All provisions of the general bankruptcy act are applicable to proceedings under chapter X, except such provisions are inconsistent with express provisions in chapter X. Some provisions of the general act are clearly inconsistent with the corporate reorganization provisions and are therefore inapplicable. Other provisions are clearly applicable. **However, there are certain sections which by their nature permit of doubt as to whether or not they are applicable.** * * *
>
> "In this enumeration of sections and subsections which are not applicable, we include only those as to which there may be reasonable doubt.[15] The sections which we enumerate are 23, 57 (h), 57 (n), 64, and 70 (f). We propose that section 102 be amended to provide that these sections and subsections shall not be applicable to proceedings under chapter X."

And again at page 82:

> "Mr. Gerdes * * * Under 77B, certain sections of the general Bankruptcy Act were expressly stated to be inapplicable to proceedings under the section. That was eliminated in this pending bill. We are now seeking to insert a provision similar to that in 77B, so there may not be any doubt as to whether they are applicable or not. **We are simply carrying into this bill certain provisions which already exist in 77B."**

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[15]As just noted, Professor Gerdes was of the view that Section 23 was already inapplicable under Section 77B, and he was proposing to make a specific reference to it solely to remove any opportunity for doubt. Compare Gerdes on Corporate Reorganizations (1935), pages 1464, 1465, 1478, with Gerdes "Corporate Reorganization: Changes Effected by Chapter X of the Bankruptcy Act", 52 Harvard Law Review (1938) 1, at page 21, note 117. No one ever had any idea at any time that the abrogation of Section 23 changed the basis of summary jurisdiction or gave the bankruptcy court extra-territorial jurisdiction over persons or over property not in the possession of the debtor.

There were no discussions of the proposed amendment to Section 102 other than those herein cited. If Congress had intended any far-reaching and radical change in the character of jurisdiction of the bankruptcy court, it is not conceivable that such change would have been effected without discussion in committee reports and debate in Congress on the subject. The amendment proposed by Professor Gerdes was recommended by the Judiciary Committee in its report to the Senate (Report 1916, dated April 20, 1938, page 23), was adopted by the Senate without discussion (83 Congressional Record 8697), and was thereafter adopted by the House of Representatives without discussion (83 Congressional Record 9101-9110).

The foregoing analysis of the legislative background is confirmed by Mr. Weinstein, who played a leading part in drafting the Chandler Act and to whom the petitioner refers on page 29 of his brief.[16]

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[16]At page 193 of his "Bankruptcy Law of 1938" Mr. Weinstein says, concerning Section 102:

"This section has been derived from subd. k of sec. 77B, which enumerated certain sections that were to apply in the case of a liquidation, then provided that, with the exception of certain provisions of the enumerated sections, such enumerated sections were not to apply to the reorganization proceeding proper, and finally provided that all other provisions of the Act, except where inconsistent with the provisions of sec. 77B, were to apply to proceedings under that section, whether or not a liquidation order has been entered. This was an involved and confusing provision which has been simplified in the Chandler Act. Sec. 102 excepts from applicability to a reorganization proceeding proper certain specified undesirable provisions of the Act which might be applicable unless specifically excepted. Upon the entry of a bankruptcy order (sec. 208), all of the provisions of the Act, so far as possible and including the specified excepted provisions, become applicable.

"Sec. 23, which limits the jurisdiction of the bankruptcy court, provides that, as to suits by receivers or trustees, the jurisdiction shall be the same as if the bankrupt had sued and bankruptcy had not occurred. **However, a Federal equity receiver is not so restricted; he may sue in his own court regardless of the jurisdictional requirements of diversity of citizenship and amount ($3,000). By the elimination of sec. 23, the Federal equity rule becomes applicable** under this chapter if the judge invests the trustee with the rights and powers of an equity receiver, as provided in sec. 187."

The following conclusions are inevitable:

(a) Section 23 was expressly mentioned in Section 102 only to leave no room for doubt that the bankruptcy court should have the same jurisdiction with respect to plenary suits as a federal equity court would have in a receivership proceeding, thereby assuring the fulfilment of Section 115;

(b) There was no other reason for the express mention of Section 23 in Section 102, nor did it ever occur to anyone that the mention of Section 23 in Section 102 would enlarge in any way the summary jurisdiction of the bankruptcy court; and

(c) The exclusion of Section 23 did not give the bankruptcy court in a plenary proceeding more extensive jurisdiction than a federal equity receivership court would have, and therefore did not authorize the bankruptcy court to maintain a plenary proceeding by extraterritorial service of process.

At pages 29 and 30 of the petitioner's brief he refers to a colloquy in the hearings before the House Judiciary Committee which he contends indicates that Congress "deemed it preferable to require a citizen of Texas to come to Detroit to contest, in the reorganization court in Detroit, title to property located in Texas, than to go back to the old idea of ancillary receiverships and litigation throughout the country."

While it is, of course, true that Congress desired to eliminate ancillary receiverships, the claim of the petitioner that the colloquy referred to indicates an intention by Congress to permit a bankruptcy court to issue its process throughout the nation to try title to property not in the bankrupt's possession, is without foundation. This is obviously so because, as we have already pointed out,

the colloquy took place before a House Judiciary Committee which reported Section 102 without any provision for the express exclusion of Section 23, and yet it is upon that express exclusion that petitioner rests his argument.[17]

There is not a single statement or suggestion from any official source at any time even remotely supporting the argument that Congress intended to give a bankruptcy court in a reorganization proceeding extra-territorial jurisdiction to try title to property in the actual adverse possession of a third person asserting a serious claim of ownership. This Court and lower federal courts have repeatedly held that express and unmistakable language is required to authorize extra-territorial service of process; see *Robertson v. Railroad Labor Board*, 268 U. S. 619, 622, 627 (1925); *Graustein v. Rutland R. Co.*, 256 Fed. 409, 411 (D. C. D. Mass., 1919).

At page 26 of his brief, petitioner cites Finletter's Law of Bankruptcy Reorganization as apparently supporting his contention. The views of Professor Finletter are directly contrary, as shown by the statement at page 178 of his work:

> "* * * The complete power of the court to issue nationwide service for all purposes would mean that persons who held property under a bona fide claim of right would be obliged to defend that right in a court **far distant from the location of the property and the witnesses.** Since Section 23b is not applicable to proceedings under Chapter X **this would**

[17]Moreover, an examination of the colloquy will show that the complaints which were expressed in letters written to the Committee were cases where the bankruptcy court had properly exercised jurisdiction because the bankrupt had possession; compare *Ex parte Baldwin*, 291 U.S. 610 (1934); *Chandler v. Perry*, 74 F. (2d) 371 (C.C.A. 5, 1934). The complaints presented with respect to these cases received no consideration from the House Committee or from Congress, which desired to make no change in the jurisdiction of the bankruptcy court where there was **possession** of the *res*. This does not afford the slightest basis for the suggestion that Congress intended the bankruptcy court to have jurisdiction where there was no possession.

> **mean that every suit to which a trustee appointed under that chapter is a party could have its venue in the reorganization court, even though the defendant be a resident of and the property which is the subject of the litigation be situated in a far distant state.** Even under Chapters XI and XII, where Section 23 is applicable, suits for the recovery of property from bona fide adverse claimants under Sections 60, 67 and 70, which are excepted from the provisions of Section 23b, could have their venue in the reorganization court regardless of the location of the property or the residence of the defendant if extra-territorial service were permitted. **It is believed that it is not sound to find that Chapters X, XI and XII by implication effect such a departure from standard practice."**

In the present case the District Court undertook to do in a **summary** proceeding just what Professor Finletter concluded Congress could not have intended to permit even in a plenary suit, namely, by a nationwide service of process, to require the respondents to defend in a court **"far distant from the location of the property and the witnesses"** their right to property held under a bona fide claim of right.

The other leading writers on Chapter X of the Bankruptcy Act take the same view as that indicated by Professor Finletter; see Moore's Bankruptcy Manual (1939), pages 497-498, and the works of Professor Gerdes and Mr. Weinstein which we have already cited.

Since 1910 certain cases arising under Sections 60, 67 and 70 of the Bankruptcy Act have been expressly excepted from the application of Section 23. But we have searched in vain for a single case arising since 1910—more than thirty years—in which it has been even contended, much less held, that the abrogation of Section 23 as to cases arising under these Sections gave any power

to a bankruptcy court to exercise extra-territorial jurisdiction over persons and property not subject to its process. What basis is there for a contention that the abrogation of Section 23 as to cases arising under Chapter X gives the bankruptcy court extra-territorial jurisdiction which has never been held to exist in cases arising under Sections 60, 67 and 70, as to which Section 23 has been abrogated since 1910?

As the Court of Appeals declared in its opinion,

> "No such unreasonable election may be deduced from the language of the statute, or from the authorities which have been considered."[18] (122 F. (2d) 232, 239).

While the District Court Was Without Jurisdiction to Maintain Even a Plenary Proceeding by Extra-territorial Service of Process, Actually the Proceeding Was Summary.

The proceeding was summary. It was repeatedly so denominated by the petitioner Trustee, who also procured the District Court to so characterize it in its conclusions of law (R. I-307, 329, 330; V-2512). The Circuit Court of Appeals also found the proceeding to be summary (122 F. (2d) 232, 234). The proceeding was brought upon the theory that it could not be maintained except as a summary proceeding and by proof that the property in controversy was in the possession of the Debtor. It was only afterwards that the petitioner shifted his position to the present contention that the proceeding was not

[18] As noted *supra*, page 12, the Court pointed out:
"* * * Were it otherwise, every bona fide possessor of property held adversely to a bankrupt could be haled into a distant Federal Court to defend his right to the property whenever the trustee in a reorganization proceeding should choose to corral him summarily." (122 F. (2d) 232, 239).

summary and that possession of the Debtor was not essential.

The proceeding was instituted by a rule to show cause upon a petition drafted in the most general terms, and the respondents were cited summarily to appear. The proceeding did not lose its character as summary because the District Court was compelled by constitutional requirements to allow respondents a fair hearing upon the summary proceeding; see *In re Prima Co.*, 98 F. (2d) 952 (C.C.A. 7, 1938), certiorari denied 305 U. S. 658, where the Court said at page 957:

> "* * *Appellees, however, contend that, although the proceeding was summary in character, it was in fact a plenary action, inasmuch as all the evidence which could have been heard in a plenary action was heard. Such fact we think is not always determinative of the question. It would seem that if the hearing were plenary, the judgment should have been plenary and not summary in its character. Here, however, there was a summary judgment requiring payment forthwith, and upon default appellants would be subject to penalty for contempt. Under these circumstances we think the proceedings were in fact summary rather than plenary."

See also *In re Midtown Contracting Co.*, 243 Fed. 56, 60 (C.C.A. 2, 1917), certiorari denied 245 U. S. 654.

In support of his present contention that the proceeding below was not summary petitioner relies upon *Board of Trade of City of Chicago v. Johnson*, 283 Fed. 374 (C.C.A. 7, 1922). Certiorari was granted in that case by this Court, which in its opinion repeatedly characterized the proceeding as a summary one (264 U. S. 1, 6, 14). The Court devoted ten pages of opinion to an analysis of whether the bankrupt had possession and whether there

was accordingly jurisdiction to determine the issues in a summary proceeding. Manifestly, the Court would never have engaged in an extensive inquiry of this character if it could have given the short answer that the form of the action was plenary. This decision is, therefore, a rejection by this Court of the theory for which the Trustee contends.

All the other cases cited by the petitioner are cases where the respondents failed to make formal objection or, indeed, affirmatively urged the court to proceed summarily; see, for example, *In re Rockford Produce & Sales Co.*, 275 Fed. 811, 813 (C.C.A. 7, 1921). Such cases have no application here, where the respondents have at all times strenuously resisted the assertion of summary jurisdiction.

The Trustee has been unable to produce a single case where a respondent in possession under a substantial adverse claim made timely objection to a summary proceeding and the court nevertheless held that he could not be heard to object because he had been granted an opportunity to be heard, as the Constitution requires that he should be. We are satisfied that no such case exists.

It is, however, really immaterial whether the proceeding below is to be characterized as summary or plenary. Even if it could be properly characterized as plenary, petitioner's jurisdictional difficulties would still remain and the District Court had no jurisdiction to entertain it. Stating the argument in other words, (a) the proceeding here involved was in fact summary and cannot be maintained where the property in controversy is in the possession of a third person under a substantial claim of ownership; (b) if the proceeding could be characterized as not summary but plenary, the bankruptcy court was without jurisdiction to maintain it as to prop-

erty outside the district in the possession of a defendant also outside the district and asserting ownership under a substantial claim; Congress never intended to give a bankruptcy reorganization court the extraordinary power to try cases against non-resident defendants involving title to property not in the bankrupt's possession.

The Opinion of the Circuit Court of Appeals Does Not Conflict With Any Other Decisions.

The petitioner assigns as a reason for the granting of writs of certiorari that the decision of the Sixth Circuit Court of Appeals conflicts with the decision of this Court in the *Rock Island* and *Magnolia* cases and with the decision of the Fourth Circuit Court of Appeals in *Warder v. Brady*, 115 F. (2d) 89 (C.C.A. 4, 1940).

We have already fully discussed the decisions of this Court in the *Rock Island* and *Magnolia* cases (*supra*, pages 10-12), and pointed out the clear distinction between the factual situations presented in those cases and the situation presented in this case. In the *Rock Island* case there was no controversy as to ownership of the property involved, as there is here; there were no adverse claimants. In the *Magnolia* case the Court declared that possession was the test, as the Sixth Circuit Court of Appeals held in the instant case.

The petitioner's contention that the decision of the Sixth Circuit Court of Appeals conflicts with *Warder v. Brady* is equally unfounded. The petitioner alleges (page 16 of his brief) that in the cited case the Fourth Circuit Court of Appeals held that possession was no longer the test of jurisdiction in corporate reorganization proceedings, and that all suits to which the Trustee was a party could be instituted in the bankruptcy court against ad-

verse claimants, without regard to possession. An examination of the case will show that these contentions are specious. The facts in the case were as follows:

A receiver appointed by a State court for a coal mining corporation operated the mines for several years and collected certain funds which he earmarked for the payment of amounts due bondholders. A trustee appointed in reorganization proceedings under Chapter X filed a summary proceeding in the federal district court, praying for an order directing the State court receiver to turn over these funds. The amount in controversy was less than $3,000 and there was no diversity of citizenship. The district court maintained its jurisdiction over the summary proceeding and entered a turn-over order. On appeal this judgment was reversed. The Circuit Court of Appeals expressly held that there was **no jurisdiction to maintain a summary proceeding,** although the trustee had been appointed under a Chapter X proceeding, because the property was in the possession of an adverse claimant (since the receiver was holding the money for the benefit of bondholders and not for the debtor).

Petitioner quotes (pages 28 and 29 of his brief) the statement of the Fourth Circuit Court of Appeals to the effect that "the bankruptcy court under Ch. X has jurisdiction to entertain all suits to which its trustee or the debtor in possession is a party, even though they be instituted against adverse claimants." In making this statement, the Court was simply recognizing that Section 23 was not applicable under Chapter X and that therefore a **plenary** proceeding could be maintained in the bankruptcy court without regard to diversity of citizenship or amount in controversy, **where the defendant was subject to service of process within the jurisdiction** (which is not the case here). Nothing in the statement indicates any

view of the Court upholding extra-territorial service of process in a plenary proceeding. Moreover, nothing in the statement supports the contention that the Court would have sanctioned any enlargement of summary jurisdiction, for immediately following the quoted language the Court made the following statement (which the petitioner omits from his quotation):

> "It **does not follow,** however, that the jurisdiction of the bankruptcy court over suits against an adverse claimant may be summarily exercised. The statute does not so provide; and under the well established procedural rule of the ordinary bankruptcy courts, as we have seen, suits by a trustee to recover property from an adverse claimant in possession must take the form of a plenary action. This is especially true when the title to property is in dispute. * * * " (115 F. (2d) 89, 94).

On this point, therefore, there is no conflict between *Warder v. Brady* and the decision of the Sixth Circuit Court of Appeals in the present case.

Petitioner also quotes (page 28 of his brief) the statement of the Fourth Circuit Court of Appeals in *Warder v. Brady* to the effect that "the summary power of the court extends to all of the debtor's property that can be affected by a plan, whether or not the property is in his possession." This statement is simply a recognition of the general rule, enunciated in the *Rock Island* case, that the reorganization court has exclusive jurisdiction of the **property of the debtor—not** of property merely **claimed** by the debtor and held adversely by third persons who deny the debtor's claims and allege, with a substantial basis, that in truth they are the owners. The quoted language affords no support whatever for the contention that the Fourth Circuit Court intended to

announce an enlargement of the summary jurisdiction of the bankruptcy court so as to include property adversely held; on the contrary, the language quoted is followed immediately by a discussion of the *Rock Island* case and by the specific statement that

> " * * * The propriety of a summary rather than a plenary proceeding was sustained **because an adverse claim to the property was not involved.**" (115 F. (2d) 89, 95).

On this point, likewise, there is no conflict between *Warder v. Brady* and the decision of the Sixth Circuit Court of Appeals in the present case.

Not only is there no conflict between *Warder v. Brady* and the decision in the instant case, but in fact the decisions are in entire accord because both cases denied the bankruptcy court the right to maintain summary jurisdiction against an adverse claimant in possession. The Fourth Circuit's conclusion on the very point now under discussion was expressed by it in the following language:

> "The pending case grows out of a reorganization proceeding under Ch. X and must be decided accordingly. The procedure is determined by the admitted facts that **the fund is in the possession of an adverse holder, and the title of the fund is in dispute.** If the contention of the special receiver is sustained, the reorganization court will have no interest in the fund, since in such event it will constitute no part of the debtor's estate. **It follows that recovery of the fund may be sought only in a plenary suit.**" (115 F. (2d) 89, 95).

This is precisely what the Sixth Circuit Court of Appeals held in our case. **There is no support either in the authorities or in reason for the contention that in a**

Chapter X proceeding the test of summary jurisdiction is title and not possession. Nor is there any support for the contention that in a **plenary** suit against third persons by a Trustee appointed in a Chapter X proceeding jurisdiction may be **extra-territorially** exercised.

At page 35 of his brief, petitioner contends that there is "a wide-open split and a conflict" in cited decisions of the Courts of Appeals as to the validity of extra-territorial service of process in suits in bankruptcy courts to recover property held adversely. This is not so. If the contention were well founded this Court would undoubtedly before now have granted writs of review to resolve the alleged conflict. But except in one instance it apparently never even occurred to the unsuccessful parties in the later cases cited by the present petitioner that they were entitled to obtain from this Court a writ of review.[19] In the one case in which a writ was applied for, the Court refused it.[20]

Moreover, an analysis of the cited cases shows that they in fact presented no conflict. The *Greyling* and *Prudence* cases[21] were cases in which the **debtor's property was undisputed,** and consequently the court had jurisdiction thereof by virtue of the provision in Section 77B giving exclusive jurisdiction of the property of the debtor wherever located. In the *Greyling* case the defendants were receivers of the debtor's property appointed by the State court and, therefore, of course, were holding the property for the debtor and not adversely.

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[19]A conflict of opinion in the lower federal courts is, of course, a special ground for the allowance of a writ under Rule 38.

[20]See *Keig, Trustee v. Harris Trust & Savings Bank* and *Keig, Trustee v. First National Bank*, 305 U. S. 658 (1938), denying petition for a writ of certiorari to review the decision of the Seventh Circuit Court of Appeals in *In re Prima Co.*, 98 F. (2d) 952 (C.C.A. 7, 1938).

[21]74 F. (2d) 734 and 75 F. (2d) 262.

The *Prudence* case, like the *Rock Island* case (294 U. S. 648), was one restraining the action of a pledgee of the debtor's property.[22]

Nothing in the later cases cited on page 35 of petitioner's brief is in conflict with these decisions. The facts in the later cases were widely dissimilar. All of the later cases involved attempts by a trustee appointed in reorganization proceedings to maintain, upon extra-territorial service of process, a suit *in personam* against defendants not within the jurisdiction. In all of these cases this attempt properly failed.[23] The complete lack of basis for the suggestion that these cases conflict in any way with the earlier cases is illustrated by the fact that in two of the later cases reference was actually made to the decision in the *Prudence* case, which was cited and quoted with approval.[24]

Respondents' Possession Is Not Open to Doubt.

The facts as to possession are, for present purposes, adequately summarized in the opinion of the Court of Appeals, which properly concluded:

> "The actual possession by appellants of their mineral servitudes by the active exercise thereof has been abundantly shown by evidence of record." (122 F. (2d) 232, 242).

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[22]In the *Prudence* case the Court of Appeals for the Second Circuit said:

> "* * * The order at bar is merely ancillary to such a possibility; **to preserve the pledge pendente lite;** * * *" (75 F. (2d) 262, 264).

[23]See *United States v. Tacoma Oriental S.S. Co.*, 86 F. (2d) 363 (C.C.A. 9, 1936); *Bovay v. H. M. Byllesby & Co.*, 88 F. (2d) 990 (C.C.A. 5, 1937); *In re Prima Co.*, 98 F. (2d) 952 (C.C.A. 7, 1938), certiorari denied 305 U. S. 658; *In re Standard Gas & Electric Co., Hastings v. H. M. Byllesby & Co.*, 119 F. (2d) 658 (C.C.A. 3, 1941). To the same effect is *Thompson v. Terminal Shares, Inc.*, 104 F. (2d) 1 (C.C.A. 8, 1939), certiorari denied 306 U. S. 652.

[24]See *United States v. Tacoma Oriental S.S. Co.*, 86 F. (2d) 363, 368; *In re Prima Co.*, 98 F. (2d) 952, 958.

The respondents have been in possession continuously since 1928, **more than ten years before the institution of the summary proceedings herein.**[25] In the course of the operations which the District Court in Michigan undertook summarily to enjoin, respondents had, over a period of **years** up to January 1, 1940, drilled 117 sulphur wells and 12 producing oil wells, made an investment of more than $6,000,000, produced large quantities of sulphur and oil, and employed several hundred men (R. II-817, 858, 865-66, 925).

This possession was obviously of the most open and notorious character. It was also exclusive. The Debtor was entirely familiar with respondents' possession, acquiesced in it, never undertook any mineral operations of its own, never attempted in any way to interfere with the operations of respondents before the present proceeding began in 1938. On the contrary, the Debtor by repeated declarations and legal proceedings in Louisiana recognized the right of respondents to conduct their mineral operations, limiting itself to a demand for royalties (R. IV-1641, 1934, 1607-8, 1959).

In such a situation what possible basis could fairly be put forward to require these respondents to litigate in a federal court in Michigan their title to the mineral rights which they have for so long exercised without question?

Petitioner says in his brief at page 38 that this Court has indicated by its decisions in the *Magnolia* case (309 U. S. 478) (1940) and in *Warren v. Palmer* (310 U. S. 132) (1940):

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[25]The first explorations for oil were in 1928; the first oil well was drilled in 1929; the first oil production was obtained in 1931. Sulphur explorations were conducted in 1932 and the first producing wells were brought in in 1933 (R. III-1024, 1166; II-814-17, 854, 865).

> "that in corporate reorganizations it is concerned with realistic and not fictitious possession."

We entirely agree with this test of possession. Indeed it is we who first advanced it in argument below, citing the decision of the Second Circuit Court of Appeals in *Palmer v. Warren*, 108 F. (2d) 164 (C.C.A. 2, 1939), affirmed 310 U. S. 132, where the Court said:

> "* * * Moreover, we can attach no meaning whatever to the 'possession' of a legal interest in a thing, except as it means **possession of the thing as an object of nature.** The reason lying back of the whole doctrine is **practical** rather than conceptual, as appears very plainly when the dispute concerns the right to possession. * * * " (108 F. (2d) 164, 166).

Upon a realistic basis who could have any doubt as to who was in actual, physical, open, notorious possession of the property in controversy here? The respondents, who have spent millions of dollars in conspicuous physical works, who have carried on operations for over ten years upon the property, employing hundreds of men? Or the petitioner and the Debtor, who have never made the slightest attempt to institute any mineral operations upon the property or, prior to the commencement of these proceedings, to restrain the operations of the respondents thereon?

Under Louisiana law it is well established that the mineral rights in controversy here are susceptible of separate ownership and possession, apart from the ownership and possession of the surface; that such rights are possessed by the exercise thereof through the extraction of minerals; and that such possession is adverse to any person, including the owner of the surface, who asserts an adverse claim to the mineral rights. These proposi-

tions are fully supported by the Louisiana cases which are discussed in the opinion of the Circuit Court of Appeals; see *Connell v. Muslow Oil Co., Inc.*, 186 La. 491 (1937), and other Louisiana cases cited in the opinion of the Court. None of the Louisiana cases were referred to by the District Court, although they were all called to its attention in briefs and in oral argument.

While the fact is without controlling legal significance in the disposition of the present application for certiorari, the Debtor was not even in possession of the surface of the area in controversy here because the surface is under lease for 99 years to the respondent Freeport Sulphur Company, which is in actual possession thereof.[26] Even in a controversy over the surface, it is believed that the actual realistic possession of the lessee would control in determining bankruptcy jurisdiction; compare *Warren v. Palmer*, 310 U. S. 132 (1940), affirming *Palmer v. Warren*, 108 F. (2d) 164 (C.C.A. 2, 1939). The lessee's independent possession and his right to defend the same in opposition to the lessor in a controversy over the exercise of rights in the property is recognized by Louisiana law; see Louisiana Civil Code, Article 2692; *State ex rel. Jennings-Haywood Oil Syndicate v. De Baillon*, 113 La. 572 (1904), cited with approval and followed in *Pan American Production Co. v. United Lands Co.*, 96 F. (2d) 26 (C.C.A. 5, 1938).

The Court of Appeals Properly Rejected the Findings of the District Court in Deciding the Jurisdictional Issues.

There are several answers to the petitioner's contention that this Court should grant certiorari because the

[26]The Record shows that no representative of the Debtor has even set foot on the property since April, 1932 (R. II-600-1, 618).

requirements of Rule 52 (a) of the Federal Rules of Civil Procedure were violated through "the complete disregard by the Court of Appeals in the instant case of the findings of fact of the Trial Court."

It may be pointed out again that the District Court wrote no opinion. The findings of fact were written by counsel for the Trustee.[27] The record abounds in other indications of the extraordinary attitude of the Trial Court.[28]

Rule 52 of the Federal Rules of Civil Procedure with respect to the setting aside of findings of fact only where they are clearly erroneous is based upon the court's proximity to the trial and the opportunity afforded thereby to judge the credibility of witnesses whose statements are not in accord; see Moore's Federal Practice (1938), page 3118, note 6. In the present case the great bulk of the record is made up of documentary evidence. A number of the witnesses testified by depositions. Only twelve witnesses testified in the courtroom, some of them very briefly, six not being cross-examined. The defects in the findings of fact adopted by the District Court were not due to failure of the Court properly to resolve con-

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[27]There are 85 paragraphs in the findings of fact and conclusions. Except for paragraph 1 of the findings and paragraph 17 of the conclusions and purely formal changes in two other paragraphs, every single paragraph in the findings of fact and conclusions of law submitted by the Trustee was taken *verbatim*. Pertinent are the observations of the court in *Process Engineers, Inc. v. Container Corporation of America*, 70 F. (2d) 487 (C.C.A. 7, 1934).

In the present case, in adopting literally the findings and conclusions submitted by the Trustee, the District Court made some findings which even counsel for the Trustee found to be erroneous and which they procured the Court to amend (R. I-344-49).

[28]See, e.g., R. V-2514-16; II-715-16, 772-80; III-1054, 1496. The jurisdictional motions of respondents (which the Circuit Court upheld) were, as the Circuit Court pointed out, "stigmatized as 'an attempt to use the courts to delay and hinder people from enforcing **their** property rights' " (122 F. (2d) 232, 244). The remarks of the District Judge fully provoked this characterization by the Circuit Court (R. V-2514-16).

flicts in testimony requiring a decision as to credibility of witnesses. The defects resulted from failure fully and clearly to state many facts and, in a few instances, from the making of statements directly opposed to the only evidence in the record on the point. The present is certainly no case for the granting of certiorari on the ground that the Circuit Court of Appeals improperly disregarded the District Court's findings of fact.

The fundamental error committed by the District Court was in entirely ignoring the Louisiana decisions—not only the case which settled Cockrell's power to lease **all** of the mineral rights here in controversy, *Mt. Forest Fur Farms of America, Inc. v. Cockrell*, 179 La. 795 (1934), but the decisions holding that persons extracting minerals are in possession of the right to extract such minerals.

The petitioner's claim (pages 40 and 41 of his brief) that certiorari should be granted because the decision of the Circuit Court of Appeals was based upon a disregard by that Court of the District Court's finding that the lease granted by Cockrell covered only 1/8th of the minerals, is also without force. That finding of the District Court was directly opposed to the decision of the Supreme Court of Louisiana in the case just cited. But it is quite incorrect to say that the Court of Appeals' decision was rested **solely** upon its finding that under the decision of the Supreme Court of Louisiana the lease granted by Cockrell covered the mineral interest claimed by the Debtor and that the respondents were in possession of the mineral rights under that lease. The **primary** basis for the decision of the Court of Appeals was its finding that the respondents were in independent possession of

the mineral rights. This finding was arrived at by the Court after an extended analysis of the Louisiana decisions recognizing the independent possession of mineral rights by the exercise thereof and after a full review of the indisputable facts in the record showing the existence of such possession in this case by the respondents; see 122 F. (2d) 232, 239-243. It was only after this discussion that the Court assigned the decision of the Supreme Court of Louisiana in the so-called bonus money suit as an **additional** ground for its conclusion, saying that the Trustee's contention

> "must be rejected for the **further** reason that the appellant sulphur company and the appellant oil companies are in possession of their mineral servitude, not under leases from the debtor corporation or its predecessor, but under mineral lease titles originating directly from Cockrell, direct vendor of the vendee who sold the land to the debtor. The right of Cockrell to execute the mineral leases 'in his own right, and not as agent for anyone' is res adjudicata. Mt. Forest Fur Farms of America v. Cockrell, 179 La. 795, 155 So. 228, 229, supra." (122 F. (2d) 232, 244).

There is no basis for petitioner's contention that the jurisdictional issues are necessarily involved with the merits. Summary jurisdiction was denied by the Court of Appeals because of its finding that the possession by the appellants of their mineral servitude had been openly adverse to the appellee landowner (122 F. (2d) 232, 243). This conclusion was independent of any finding upon the merits. It was based upon respondents' possession and upon the Louisiana decisions supporting such possession.

CONCLUSION

It would be difficult to imagine a case in which less argument for the maintenance of jurisdiction in the bankruptcy court in Michigan could be made than in the present case. The issues upon the merits relate solely to Louisiana mineral rights, which are immovable and local in their nature and must be controlled by Louisiana law. Even if the bankruptcy court had been entitled to exercise jurisdiction, it would have been its duty in the exercise of a proper discretion to stay the proceedings and refer the issues to the State courts of Louisiana for decision; see *Thompson, Trustee v. Magnolia Petroleum Co.*, 309 U. S. 478 (1940). The present is a stronger case for the application of the rule than the *Magnolia* case because of the peculiar character of the Louisiana jurisprudence, which is based upon the civil law; *cf.* the comment of Holmes, J. in *Black and White Taxicab and Transfer Company v. Brown and Yellow Taxicab and Transfer Company*, 276 U. S. 518, 533 (1928). In the instant case the District Court, in effect, undertook to ignore and set aside a decision of the Supreme Court of Louisiana involving the very mineral lease which is involved in this case; see *Mt. Forest Fur Farms of America, Inc. v. Cockrell*, 179 La. 795 (1934).

The attempt of the District Court to insist upon jurisdiction in this case is all the more extraordinary in view of the fact that there has been pending since 1936 in the Louisiana State courts a suit between all the parties to the present case, in which all of the issues open to the parties may be tried. The District Court not only insisted upon maintaining its jurisdiction and not only refused to refer the issues to the Louisiana State courts, but actually undertook to **prevent** the Louisiana State courts

from trying the issues by issuing its injunction against proceedings in the Louisiana suit.[29]

Upon the merits of the case the rights of the Debtor (and if reference to them is justified, the rights which its stockholders have through it)[30] are properly to be left to adjudication in the Louisiana courts to which the Debtor itself resorted. Until someone conceived the idea of putting the Debtor corporation, organized in Delaware and owing negligible debts, into a bankruptcy reorganization proceeding in Michigan, no one would ever have attempted to subject to the decision of any Michigan court, either federal or state, the claims here asserted against these respondents.[31]

It is, we submit, unthinkable that the reorganization provisions of the bankruptcy law permit a corporation resorting to reorganization to open to itself the doors of a remote bankruptcy court (not even sitting in the state of its incorporation) and thereby to require third persons who are not subject to the territorial jurisdiction

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[29]The position taken by the District Court may be compared with that of this Court in the cases of *City Company of New York, Inc. v. Stern* and *Chase Securities Corp. v. Vogel*, 312 U.S. 666 (1941). In the cited cases this Court held under consideration for several months applications for writs of certiorari from decisions of the Eighth Circuit Court of Appeals, while awaiting a decision of the Supreme Court of Minnesota upon a point of State law involved. When that decision came down, this Court granted certiorari and without argument reversed the judgments below, citing the decision of the Supreme Court of Minnesota.

How different was the position taken by the District Judge in this case when, instead of referring the parties to the State courts for decision upon the State law and instead of waiting for the decision of the State court in the litigation there pending, he undertook to prevent the State court from passing upon the issues of State law!

[30]Obviously the stockholders of the Debtor corporation could never have haled these respondents into a Michigan bankruptcy court to try the respondents' title to the property in controversy.

[31]There is no room for doubt that the State courts of Louisiana have jurisdiction in a proper proceeding to deal with all claims which the Debtor or the Trustee may be entitled to assert. Those courts alone would have had the power to deal with such claims if the reorganization proceedings had not been instituted and sought to be availed of to oust the State courts of jurisdiction.

of that court and who are (and long have been) in possession of property which they claim to own, situated a thousand miles away, to appear and litigate their substantial claims of ownership in the bankruptcy tribunal selected by the plaintiff.

We respectfully submit that the application for certiorari should be denied.

Respectfully submitted,

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